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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

Supreme Court, U.S.
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~~No. 1536~~

STATE OF WISCONSIN, *Petitioner,*
vs.
JONAS YODER, *Respondent.*

STATE OF WISCONSIN, *Petitioner,*
vs.
ADIN YUTZY, *Respondent.*

STATE OF WISCONSIN, *Petitioner,*
vs.
WALLACE MILLER, *Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF OF GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS AS AMICUS CURIAE

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INTEREST OF AMICUS CURIAE

The General Conference of Seventh-day Adventists has asked for and received the consent of both the appellant and appellee to file its brief *amicus curiae*. It does so not from any fear that the parties themselves will fail to effectively present their case before this high court, but

rather to underscore the fact that the decision in this case affects more than the State of Wisconsin and its Amish citizens.

A careful reading of the Questions Presented as set forth in appellant's Brief clearly indicates that the determination of the issues there presented directly affect the rights of all parents to determine the religious upbringing of their child. It further suggests that minority religious bodies may be forced to move from one state to another to find a haven for the free expression of their religious beliefs. This *amicus curiae* feels that the questions herein raised are of vital concern to, and directly affect the members of its church.

SUMMARY OF ARGUMENT

The State has made assertions of authority that place in jeopardy the right of a parent to control the religious upbringing of his child. Such a position conflicts with the free exercise provision of the First Amendment of our Federal Constitution.

This Court has on several occasions held that when state or federal legislation conflicts with First Amendment Constitutional rights the state has the burden of showing that any such governmental infringement be justified by some compelling governmental interest.

In order to sustain its burden, the State must present to the Court sufficient evidence as to demonstrate that the interest of the government is in fact, and not merely in theory, substantial.

As this Court has announced, only the gravest abuses endangering paramount interests will permit such state infringement.

The State has attempted to sidestep their evidentiary burden by claiming that the doctrine of *parens patriae* somehow minimizes the government's burden of meeting the tests laid down by this court in religious exercise cases.

Such a position as claimed by the State in its application of *parens patriae* implies the desire on the part of the

State to employ concepts of state power reminiscent of sixteenth century English religious intolerance.

The courts in this country have long recognized the right and duty of a parent to teach his child moral values and further recognize that the parent has a compelling overriding interest in training and instructing the child according to the parent's religious precepts. This parental right can not be taken lightly or quickly ignored.

The family is the basic unit of government and its breakdown in our society is acknowledged as a major cause for our youth problem. A child should not, except for the gravest causes, be forced to make the psychologically harmful decision of disobeying the religious precepts of his parent who is charged with the sensitive responsibility for moral and spiritual training of the child.

Under a government where the State is prohibited from engaging in the religious instruction of its young people the spiritual need of these children can only be met by the parent. The denial to a parent of the right to control the religious upbringing of his child is a denial of the parent's right to the free exercise of his religion.

The State Supreme Court correctly held that although education is a subject within the power of the State to regulate, based on the record in this case however, there was not such a compelling interest shown to justify the burden it placed on the free exercise of religion by the Amish. The Court therefore declared the state's compulsory attendance law unconstitutional as to these individuals.

The State claims that the Amish should not have obtained relief from the Court but should have been left to the unpredicable fickle mercy of a legislature. This concept however, ignores the right of a person to live and practice his religious views in any state provided no overwhelming governmental interest is violated.

Based on the record in this case the Wisconsin Supreme Court correctly applied the tests set forth in *Sherbert v. Vernor* (1963) 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed. 2d 965.

ARGUMENT

I. The Parent Has A Right And Duty To Determine The Religious Upbringing Of His Child

A. The State's position conflicts with constitutionally protected rights

The State of Wisconsin has, on page 4 of its brief, stated one of the issues before this court to be:

> "Whether a minor child has a constitutionally protected right to an education superior to the claim of respondent parents that education of their children beyond eighth grade violates respondents' constitutional right to worship freely."

On page 14 of its brief the State answers its rhetorical question by the flat assertion that:

> "Wisconsin and the nation have a compelling interest in the establishment and maintenance of a system of education" and "It is likewise clear beyond all doubt that this interest overrides the religious interest of the parents of children whose attendance at some school, public or private, is required."

The State however does not protest the Wisconsin high court's statement:

> ". . . There is no question that, found by the trial court, the compulsory education law infringes upon the free exercise of religion by the appellants within the scope of the protection of the First Amendment." *State v. Yoder* (1971) 49 Wis. 2d 430, 182 N.W. (2d) 539, 542.

It is therefore clear that the State is arguing that its interest in compulsory education is superior to the constitutional First Amendment rights of respondents.

Such a declaration is disturbing to all who jealously oppose the State's invasion into matters of religious concern,

and defenders of individual constitutional rights surely view such a statement with alarm when comparing it with the First Amendment mandate that there shall be no law "prohibiting the free exercise" of religion.

The State's declaration makes clear its position that in matters concerning compulsory education, the will of the majority shall control over the conscientious religious beliefs of an individual.

Such a position would have surely shocked James Madison who stated that:

> "Because we hold it for a fundamental and undeniable truth, that religion, or the duty which we owe to our creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence. The religion, then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right, because the opinions of men, depending only on the evidence contemplated in their own minds, cannot follow the dictates of other men. It is unalienable, also, because what is here a right towards men is a duty towards the Creator. It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent, both in order of time and in degree of obligation; to the claims of civil society."[1]

The State has rested its argument on "historical and constitutional values that are responsible for the very existence of our country" and so do we. The historical and constitutional values of the doctrines that are embodied in our First Amendment Freedoms are the very cornerstones of our nation and the real cause for its existence. It was for the defense of the unalienable rights of man that we broke from the British Crown.

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1. Writings of James Madison, published by Order of Congress, (Philadelphia, 1865) volume i, page 162 et seq.

B. The State cannot ipso facto substitute its will for the will of the child or his parent

The State has in its brief (page 9) suggested that the decision of the State Supreme Court "Ignores the right of the state to insulate a child from the disease of ignorance" and in addition "ignores the concomitant right of the child to know."

One may well ask, however, when and at what point does the state have a right to interpose itself between the child and his parent, and what exactly does the child have a constitutional right to know?

It may seem rather strange that an educational oriented religious organization such as the Seventh-day Adventist Church should seek to file a brief in support of the Amish position against compulsory education. The Seventh-day Adventist Church, although relatively small in size, is strongly committed to education from the first grade through college and professional school.[2] It is therefore readily apparent that its position more closely follows the prevailing notions of society as far as secondary education is concerned.

The State has, however, made a serious and potentially dangerous attack on the parental jurisdiction over the religious upbringing of their children.

Although the State has attempted to predicate its declaration of a child's right to know upon the authority of *Brown v. Board of Education of Topeka* (1954) 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, it is clear that the dicta of this case, viewed in its proper perspective, merely confirms the right of the representative of a minor to insist that the State provide to every child equal education and equal access to all public educational facilities.

In the case now before the Court the State seeks something entirely different from that contemplated in the

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2. The Seventh-day Adventist Church has a world membership of 2,051,864 and operates 4,045 elementary schools, 398 high school level schools, 77 colleges and universities and 37 schools of nursing.

Brown decision. Here the State claims the right, under the doctrine of *parens patriae* to intercede for and on behalf of the children whose parents were prosecuted by the State.

In the instant case it is clear that neither the parents nor legal guardians of the children were seeking to force the State to provide access to certain public educational facilities. It is also true that the children neither asked for nor otherwise sought the State's help. This is purely and simply a case where the State sought to substitute its will for that of the child's parents.

Even in *Prince v. Massachusetts* (1944) 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645, the Court was careful to point out that:

> "It is cardinal with us that the custody, care and nurture of the child reside first in the parents whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." 321 U.S. 166.

As noted by the New York Appellate Court in *People ex rel Session* 271 N.Y. 285, 2 NE 2d 660, 661 (1936):

> "The vast majority of matters concerning the upbringing of children must be left to the conscience, patience and self restraint of father and mother . . . Only when moral, mental and physical conditions are so bad as seriously to affect the health or moral welfare of children should the courts be called upon to act."

It therefore becomes clear that the State cannot by the mere use of such magic words as *"parens patriae"* ipso facto determine that the State's concept of child benefit be substituted for either the will of the child or his parent.

C. Courts have recognized the right of the parent to determine the religious upbringing of his child

While the State's authority over the will of minors under its jurisdiction is severely limited by legal precedent in this country, the broad powers of the minor's parent have been given recognition.

Not even the State of Wisconsin has suggested that the doctrine of *parens patriae* is a grant of general and absolute power to the State over its minor subjects such as exercised by the Spartans. Its primary use is to protect children from neglect, ill-treatment and abuse.

It is submitted that where the issue has been as to the religious upbringing of a minor, the courts have recognized the right or power of the parent to control over that of the child as a proper exercise of not only his parental rights or powers but also his parental duties.

Historically, however, the parent did not always enjoy primacy in the determination of the religious upbringing of the child as opposed to the doctrine of *parens patriae* which literally translated means "father of his country" and in England refers to the king.[3]

During the sixteenth century when the doctrine of the divine right of the king was in full bloom and the king could do no wrong, the State did exercise its absolute will over the religious upbringing of its minor subjects.

As early as 1590 the Elizabethian government aimed at the suppression of Catholic education by enacting that only school-masters who repaired to the Established Church might be maintained, followed four years later by a further statute which punished as a *praemunire* the sending abroad of a child for Catholic education.[4]

In 1723 an English Court deprived a widow of the custody of her minor children so that they might be brought up Protestants, although both parents were Catholic. In

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3. Black's Law Dictionary, 4th Edition, 1951, page 1269

4. Friedman, The Parental Right to Control the Religious Education of a Child, 29 Harv. L. Rev. 485 (1916)

1724 an English Court went so far as to order the separation of the mother and her child of seven years even though the Catholic mother was bringing up her son as a Protestant according to the wishes of her late husband.[5]

From this extremely strict concept of the doctrine of *parens patriae* a more liberal view fortunately took root.

American legal precedent seems to recognize that it is the parent who exercises the primary determination of the religious upbringing of his child. While adults are free to exercise their consciences, children are free to form theirs along the parental model. Thus in Illinois ex rel. *McCollum v. Board of Education*, (1948) 333 U.S. 203, 92 L.Ed. 649, 68 S.Ct. 461, students were only admitted to religious classes "upon express written request of parents, and then only to classes designated by the parents." While the members of the Court differed over whether a parent might thus affirmatively employ state instrumentalities to mold the religious conscience of his child, no one denied that the parent had such a perogative.

Although in *Prince v. Massachusetts* (1944) 321 U.S. 158, 165-166, 64 S.Ct. 438, 88 L.Ed. 645, this Court spoke of the "right of children to exercise their religion" as having been accorded recognition in *West Virginia Board of Education v. Barnette* (1943) 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628, and of the child's right to receive religious schooling having been sustained in *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary* (1925) 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070. It is clear that in neither *Barnette* nor *Pierce* did the child bring the action. In the *Barnette* case the parent brought the action and in the *Pierce* case the school presented the claim.

The courts have thus recognized the rights of parents to determine the religious upbringing of a child subject to that parent's custody and control.

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5. Ibid. at p. 486

D. A parent has a compelling overriding interest in educating his child according to his religious precepts

A parent's interest in the religious upbringing of his child is obvious. A father teaches his child the law of God because the Bible imposes that duty upon him as his personal obligation on a par with his own practice and necessary for his own salvation.[6]

In addition a father exercises a power which he holds in trust for his child, believing that learning God's law is beneficial to the child and necessary for its salvation.

It is at this point that the position of the Seventh-day Adventist Church and the respondents parallel. Seventh-day Adventists believe that "every child brought into the world is the property of Jesus Christ" and "Parents . . . carry responsibilities that no one can bear" for them. It is our position that the religious training of the child is a responsibility that cannot be surrendered.[7]

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6. This commanded by Deuteronomy 6:6,7 "and these which I command thee this day shall be in thy heart; and thou shalt teach them diligently unto thy children . . ." and Proverbs 22:6 "Train up a child in the way he should go; and when he is old, he will not depart from it."

7. White, Ellen G., The Adventist Home: Pages 182, 183

"In his wisdom the Lord has decreed that the family shall be the greatest of all educational agencies. It is in the home that education of the child is to begin. Here is his first school. Here, with his parents as instructors, he is to learn the lessons that guide him through life — lessons of respect, obedience, reverence, self-control . . ."

"It is by the youth of today that the future of society is to be determined, and what these youths and children shall be depends on the home. To the lack of right home training may be traced the larger share of the diseases and misery and crime that curse humanity."

"Every child brought into the world is the property of Jesus Christ, and should be educated by precept and example to love and obey God . . . By painstaking effort parents are to watch the opening, receptive mind and make everything in the home secondary to the positive duty enjoined

It is clear from the record that the Amish believe that they have a compelling overriding interest to educate their children according to their own religious principles.

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7. (Continued)—

upon them by God — to train their children in the nurture and admonition of the Lord."

"Parents should not permit business cares, worldly customs and maxims and fashions to have a controlling power over them, so that they neglect their children in babyhood and fail to give their children proper instructions as they increase in years."

White, Ellen G., The Adventist Home: Page 187

"Parents, you carry responsibilities that no one can bear for you. As long as you live, you are accountable to God to keep His way . . ."

"Fathers and mothers are responsible for the health, the constitution, the development of the character of their children. No one else should be left to see to this work. In becoming the parents of children, it devolves upon you to cooperate with the Lord in educating them in said principles."

White, Ellen G., Counsels to Parents, Teachers and Students: Page 107

"Upon all parents there rests the obligation of giving physical, mental, and spiritual instruction. It should be the object of every parent to secure to his child a well-balanced, symmetrical character. This is the work of no small magnitude and importance — a work requiring earnest thought and prayer no less than patient, persevering effort. A right foundation must be laid, a framework, strong and firm, erected and then day by day the work of building, polishing, perfecting, must go forward."

"Children must be trained for the service of sin or for the service of righteousness. Solomon says, Train up a child in the way he should go; and when he is old, he will not depart from it. Proverbs 22.6: This language is positive. The training that Solomon enjoins is to direct, educate, develop."

"By some, education is placed next to religion, but true education is religion. The Bible should be the child's first textbook . . . Through the inculcation of its principles they are to learn to do justice and judgment."

The Wisconsin Supreme Court in *State v. Yoder* (1971) 49 Wis. 2d 430, 182 N.W. (2d) 539, 541 states that:

> "The old order Amish religion dictates that the Amish child from the inception of adolescence live according to the mode of life in the Amish community" and "that he should not attend high school since any high school, public or private, constitutes a deterrent to his salvation."

The Court also found that the Amish religion requires the avoidance of worldly educational environment and imposes the duty:

> "to become mature in wisdom different from what others may regard as wisdom,"

The Court specifically found that:

> ". . . to the Amish, how long a child should attend a formal school is a religious question."

E. The State has no right to disregard an individual's religious convictions simply because it does not conform to the norms of the general educational community

The Wisconsin Court correctly stated the rule that the Court is prohibited from evaluating a religious belief for ecclesiastical purposes, citing *Abington School District v. Schempp* (1963) 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed. 2d 844 and *Presbyterian Church v. Hull Church* (1969) 393 U.S. 440, 89 S.Ct. 601, 21 L.Ed. 658.

In fact, in *United States v. Seeger,* (1965) 380 U.S. 163, 85 S.Ct. 860, 13L.Ed. 2d 733 at page 180 the Court recognizes the diversity of conceptions of religion in the United States and the "ever-broadening understanding of the modern religious community."

In *United States v. Ballard* (1944) 322 U.S. 78, 88 L.Ed. 1148, 64 S.Ct. 882 at pages 86-87 the Court stated that the First Amendment does not select any one group or any one type of religion for preferred treatment. It puts them all in that position.

It seems that the thrust of the State's position now, however, is that the decision of the Wisconsin Supreme Court has somehow spread the "disease of ignorance." The record not only does not support any finding that the "Amish way" is a way of ignorance, the Court noted in its opinion in *State v. Yoder* (1971) 49 Wis. 2d 430, 182 N.W. (2d) 539, 543 that:

> "The Amish claim, with compelling merit, that their education produces as good a product as two additional years compulsory high school education does."

The Court noted in a footnote to its opinion testimony that the Amish were not on welfare, were not unemployed, did not have illegitimate births and did not add to the social burdens of the taxpayers of Green County. Surely these are not the fruits of ignorance.

When one looks at the current drug subculture which was bred inside the best of our educational facilities in comparison to the Amish subculture, it is somewhat difficult to swallow the State's inference that Amish children have been neglected by their parents.

Is the State serious in its assertion that Amish parents have neglected their children by refusing to permit the State to offer their children the forbidden fruit of knowledge of good and evil? If so, could the State in fact take these "neglected" children from their "neglectful" natural parents and make them wards of the Court?

The State cannot impose the norms of the general educational community upon its citizens against the sincere religious conviction of an individual without proving that failure to conform to that standard is contrary to an overriding and compelling State interest as defined by the courts.

F. The State here seeks the authority to determine how a religious sect exercises its religious affairs

Equally disturbing is the attempt of the State to tell the Amish how to practice their religion. The dissenting State Supreme Court judge in *State v. Yoder* (1971) 49 Wis.

2d 430, 182 N.W. (2d) 539, 551 would have solved the problem by staying the execution of sentence (although affirming the criminal conviction)

> ". . . for such period of time as is reasonably required to properly organize and commence operation of an Amish vocational school. At the commencement of such operations, the judgment should be vacated and the complaint dismissed."

This device would not only ignore the free exercise of religion, it would place the court in a position of telling a religious body how they should practice their religion.

Encouraged by this lone dissenting position, the State Attorney General elects to tell the Amish how to exercise their religious affairs. (see page 20 of Appellant's Brief)

> "If the Amish do not want to establish secondary schools for their children," says the State, "then their children should be required to go to a more 'worldly' public secondary school."

The State Attorney General then flatly states,

> "In failing to provide for secondary education for their children, the Amish are neglecting a parental duty and obligation to their children and neglecting their duty as citizens of a democracy from which they have reaped ample benefit." (See pages 20 & 21 of Appellant's Brief)

Neither the courts nor the law enforcement agencies of the State have any business telling any person or religious sect how it will worship or believe.

G. In considering the doctrine of *Parens Patriae* the State Supreme Court properly considered the psychological harm that might result to a child forced to violate a cardinal precept of his religious training

In order to validly use the doctrine of *parens patriae,* the State would have to demonstrate that the child is being

harmed and that the action of the State will in turn not cause greater harm. This doctrine is most generally used by courts handling adoption, juvenile neglect and child custody cases.

In such cases the court gives great weight to the psychological effect on the child of any action it might take in the exercise of its powers of *parens patriae*.

> "Once the religious education of the child has progressed so far that definite religious ideas have been impressed upon its mind to the extent that a change would unsettle its traquility and disturb its mental poise, the parents are precluded from further interference with the continued development of that religious education which the child has thus acquired."[8]

This concept was no doubt in the minds of the majority of the Wisconsin Supreme Court in *State v. Yoder* (1971) 49 Wis. 2d 430, 182 N.W. (2d) 539, 542, when it stated:

> "To the Amish, secondary schools not only teach an unacceptable value system but they also seek to integrate ethnic groups into homogenized society, resulting in a psychological alienation of Amish children from their parents and great harm to the child."

The impact of psychological effects on children has been recognized by this Court as an important consideration in a determination of this kind. In *Brown v. Board of Education of Topeka* (1954) 347 U.S. 483, 74 S.Ct., 20 L.Ed. 873 the Court gave weight to such a factor.

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8. Friedman, The Parental Right to Control the Religious Education of a Child, 29 Harv. L. Rev. 485, 493. This author goes on to state on page 494, "There are cases, no doubt in which a child has from infancy until years of discretion been brought up in one particular form of religion, where the Court may consider it dangerous to compel such a child to be brought up in a different and conflicting religion, lest the diverse and conflicting teachings should make shipwreck of the child's faith, and impair its moral character. . ."

II. The Extent To Which A Person Is Permitted To Exercise His Religious Freedoms As Guaranteed By The Federal Constitution Should Be Uniform Throughout The Nation And Not Limited By State Boundaries

We are told by the appellants that the Amish must look to the legislature of the various states to find protection in the exercise of their religious convictions.

A few states such as Kansas and Iowa have by legislation exempted the Amish from compulsory education laws. Other states such as Indiana and Pennsylvania have made exemption provisions by agreement. In Michigan the question has been temporarily dealt with by action of the State Board of Education.[9]

As noted by the Wisconsin Court in *State v. Yoder* (1971) 49 Wis. 2d 430, 182 N.W. (2d) 539, 542

> "The impact on the Amish of education laws is so severe that in other states where they were required to send their children to public schools, they sold their farms and sought religious freedom elsewhere."

In *People v. Woody*, 61 Cal. 2d 716, 727 40 Cal Rep 69, 77, 394 P. 2d 813, 821 (1964) the California Court said,

> "In a mass society, which presses at every point toward conformity, the protection of a self-expression, however unique, of the individual and the group becomes even more important. The varying currents of the subcultures that flow into the mainstream of our national life give it depth and beauty."

It is a disturbing, and we submit, improper concept which would force a citizen of this nation to move from Wis-

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9. Appendix A, Brief for Respondents in Opposition On Petition for a Writ of Certiorari to the Supreme Court of the United States, pages 1a-4a.

consin to Kansas in order to practice his religious views and to raise his children according to the dictates of his conscience.

The First Amendment is applicable in all states of the union. The Amish have been guaranteed the right to the free exercise of their religion in Wisconsin as well as Kansas.

Unless the State can show that the infringement of the Amish people's right to the free exercise of religion is justified by an overwhelming governmental interest, it has no right to enforce such a law which has the effect of requiring that person to either violate his conscience or move to another state.

In *Takahaslin v. Fish & Game Comm.* (1948) 334 U.S. 410, 92 L.Ed. 1478, 68 S.Ct. 1138 the Court recognized that the Fourteenth Amendment embodies a general policy that all persons lawfully in this country have a right to live in any state. It is submitted that so long as an overwhelming governmental interest is not in conflict, as determined by the tests set out in *Sherbert v. Vernor,* (1963) 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed. 2d 965, any person should be permitted to live and practice his religious views in any state of this United States.

Must any religious group collect into large bands of a size significant enough within a state to gather the political force necessary to compel a legislature to exempt them from a state imposed obligation that violates their religious beliefs? What if the small religious groups, although as sincere and dedicated as those who can compel state attention, are not able to gain the tolerance of the majority? Are they therefore left with no relief? Is this dilemma not the purpose of the First Amendment Freedoms? The argument of the State that the Amish must gain relief through legislative exemption is merely a claim that their religious practice is not constitutionally guaranteed but may only be tolerated so long as a political majority may determine.

III. The State Court Was Correct In Determining That The Wisconsin Compulsory School Attendance Law Is Unconstitutional As Against The Claim Of Respondents That Their Right To Worship Freely Would Be Violated If They Were Compelled To Send Their Children To A Secondary School

A. The test announced in *Sherbert* applies to this case

The First Amendment provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." United States Constitution Amendment I.

Of all the constitutional guarantees, the protection of religious liberty has been the most exalted. See P. Kauper, *Religion and the Constitution* 19, (1964) (and the cases cited therein). And rightfully so, for perhaps to the individual there can be nothing more centrally controlling, revered, and treasured than a sincere and deeply held religious conviction. It was this consideration which moved the drafters of the First Amendment to provide that governmental interference with the relation between an individual and his God must be kept to a minimum.

The question arises — when may conduct prompted by a religious conviction be regulated by state law? The Supreme Court answered that question in its landmark decision in *Sherbert v. Verner*, (1963) 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed. 2d 965.

In *Sherbert*, a member of the Seventh-day Adventist Church was discharged because she would not work on Saturday, the Sabbath Day of her faith. Sherbert filed a claim for unemployment compensation benefits under a state statute which provided that a claimant was ineligible for benefits if she had failed, without good cause, to accept available suitable work when offered her. The State denied Sherbert's application on the ground that she did not accept suitable work when offered to her. The Court held that to disqualify Sherbert solely on the ground that she had refused Saturday work, when the acceptance of

such work would have been contrary to her religious beliefs, was to impose an unconstitutional burden on the free exercise of her religion. In so holding, this Court announced a several fold test for balancing the competing interests:

1. Is there a burden imposed on the exercise of religion?

"If . . . the decision of the (court below) is to withstand Appellant's constitutional challenge, it must be either because her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise . . ." 374 U.S. at 403.

2. If there is such a burden, is the infringement justified by a compelling governmental interest?

"We must . . . consider whether some compelling (governmental) interest . . . justifies the substantial infringement of Appellant's First Amendment right." 374 U.S. at 406.

a. Is the governmental interest substantial?

". . . only the gravest abuses, endangering *paramount* interests, give occasion for permissible limitation . . ." 374 U.S. at 405 (citation omitted) (emphasis added).

b. Is this the sole method by which the government may attain its goal?

". . . it would plainly be incumbent upon the (government) to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment Rights." 374 U.S. at 407 (footnote omitted).

3. Would an exemption for those with religious scruples *in fact* impair the governmental interest?

"The Appellees suggest no more than a *possibility* (that the government's interest would be impaired). 374 U.S. at 407 (emphasis added).

The test announced in *Sherbert* has been restated and applied in several recent cases:

> "But the burden rests upon the Government to demonstrate the compelling interest requiring the restriction of free expression and to show that the regulation serves that interest with the least restriction possible on the citizens ability to communicate his political dissent." *Women Strike for Peace v. Hickel,* 420 F. 2d 597, at 605, (D.C. Cir. 1969).

> ". . . Where governmental activity impairs individual ability to abide religious beliefs, two demonstrations become essential to its validity. (A showing of a compelling governmental interest and) an equally convincing showing that 'no alternative forms of regulation would combat such abuses without infringing First Amendment Rights.' " *Barnett v. Rodgers,* 410 F. 2d 995, at 1000 (D.C. Cir., 1969).

> "The Court in *Sherbert* thus utilized a twofold analysis which calls for a determination of, first, whether the application of the statute imposes any burden on religion, and second, if it does, whether some compelling state interest justifies the infringement." *People v. Woody,* (1964) 61 Cal. 2d 716, 719, 40 Cal. Rptr. 69.

> ". . . even if a compelling state interest were shown, the burden remains on the state (to show no alternative is available)." *Heilberg v. Fixa* 236 Fed. Supp. 405, 408. (N.D. Cal. Sd. 1964) Cf. *Kovach v. Maddux,* 238, F. Supp. 835, 844, (MD Tenn. 1965).

And in dicta the Supreme Court recently reaffirmed the validity of the *Sherbert* test:

> ". . . as to neutral prohibitory or regulatory laws having secular aims, the Free Exercise Clause may condemn certain applications clashing with imperatives of religion and conscience, when the burden on First Amendment values is not justifiable in terms of the Government's valid aims." (citing *Sherbert*) *Gillette v. U. S.,* 91 S.Ct. 828, 842, 28 L.Ed. 168 (1971).

The State has placed almost all of its confidence in their position on the opinion of *Prince v. Massachusetts* (1944) 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 which was handed down by this Court in 1944. This case came many years and several decisions before the evolvement of the test announced by this Court in *Sherbert*.

It is clear that this Court has, in the past two decades since the decision in *Prince*, given more careful scrutiny to the free exercise clause of the First Amendment.

It is submitted that to this Court, religious liberty as an ideal means essentially the absence of governmental restraint on the activities of young and old alike as they seek God's will.

The decision in *Prince* cannot in 1971 be read with blinders as to the development of the law concerning First Amendment rights in the light of the principles set forth in such recent decisions of this Court as *Sherbert*. Even the doctrine of *parens patriae* must submit to the balancing tests which this Court has adopted. The time when the doctrine of *parens patriae* was synonymous with the concept of the divine right of the State is in the past.[10]

B. The application of the *Sherbert* test to the instant case will demonstrate that this is a case where "the burden on First Amendment values is not justifiable in terms of the Government's valid aims"

The Court in *Sherbert* observed that where a law having uniform application has a discriminatory effect upon an individual's religion, it is invalid:

> "... it is true that no criminal sanctions directly compel Appellant to work a six-day week. But this is only

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10. See Grannella, Religious Liberty, Nonestablishment, and Doctrinal Development, Part I. The Religious Liberty Guarantee, 1967, Harv. L. Rev. May 1967, Vol. 80, No. 7; Also Compulsory High School Attendance and The Old Order Amish; A Commentary on *State v. Garber*, Casad, 16 Kansas L. Rev. 423, 432 (1968).

> the beginning, not the end, of our inquiry. For if the purpose or effect of a law, is to impede the observance of one or all religions or is to discriminate invidiously between religions, *that law is constitutionally invalid* even though the burden may be characterized as being only indirect, *Braunfeld v. Brown*, (1961) 366 U.S. 599, 6 L.Ed. 2d 563, 81 S.Ct. 1144. Here not only is it apparent that Appellant's declared ineligibility for benefits *derives solely from the practice of her religion —, but the pressure upon her to forego that practice is unmistakeable.* The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same burden upon the free exercise of religion as would a fine imposed against Appellant for her Saturday worship." 374 at 403-404 (footnote omitted) (emphasis added)

In comparing the dilemma presented in *Sherbert v. Vernor* with the position in which the State has placed the Amish, it has been recognized that a more serious interference is present in the instant situation.

> "The interference here is clearly more serious than involved in *Sherbert v. Verner* itself. The burden on free exercise there was indirect. South Carolina did not require Mrs. Sherbert to work on Saturday; it only made it economically disadvantageous if she did not. Here, the interference with both the parent's and the child's right of free exercise (if a child has protectable interest in his own right) was direct."[11]

It is important to recognize that *Sherbert* imposes a test upon governmental regulation far more stringent

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11. Casad, Robert C., Compulsory High School Attendance and the Old Amish; A Commentary on *State v. Garber*, 16 Kansas L. Rev. 423, 432 (1968).

than that applied in the absence of a First Amendment infringement. In the "flag-salute" case of *Board of Education v. Barnette,* (1943) 319 U.S. 624, 63 S.Ct. 1178, 87 L. Ed 1628, the Court observed:

> "In weighing arguments of the parties, it is important to disinguish between the due process clause of the Fourteenth Amendment (here the Fifth Amendment) as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more involved. Much of the vagueness of the *due process clause disappears when the specific prohibitions of the First become its standard.* The right of a State to regulate, for example, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a "rational basis" for adopting. *But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds.* They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect. 319 U.S. at 639 (emphasis added).

In *Braunfeld v. Brown* (1961) 366 U.S. 588, 6 L.Ed. 2d 563, 81 S.Ct. 1144, Mr. Justice Brennan in a concurring and dissenting opinion observed:

> "... the values of the First Amendment, as embodied in the Fourteenth, look primarily towards the preservation of personal liberty, rather than towards fulfillment of collective goals." 366 U.S. 610.

In *Sherbert,* the Court announced that the test first applied in *Barnette* was to be an essential part of the balancing test applied in all future First Amendment infringement cases:

> "It is basic that no showing *merely of a rational relationship* to some colorable state interest would

suffice; in this highly sensitive constitutional area, 'only the gravest abuses, endangering paramount interest, give occasion for permissible limitation.' " 374 US at 406 (citation omitted) (emphasis added).

The *Braunfeld* case, supra and the *Sherbert* case, supra, clearly require the State to establish both the paramount governmental interest in denying religious freedom and that the same paramount governmental interest is impossible of attainment by granting a religious exemption. Neither was established in this case.[12]

1. The governmental interest is not substantial

The conduct of the Amish presents no grave threat to society. They only ask to be exempt from sending their children to secondary schools. Their conduct can hardly be said to threaten "public safety, peace or order," *Sherbert,* 374 U.S. at 403. The governmental interest in compulsory education involves no such paramount interest.

The Appellant's Brief, although ignoring the balancing test in *Sherbert v. Verner* (1963) 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed. 2d 965 which places an affirmative burden on the State to show a compelling governmental interest, does seem to make some attempt to justify the State's encroachment into the area of the free exercise of religion by reference to education as a needed aid to the continuation of a free nation.

The State quotes several statements made by Thomas Jefferson in their apparent attempt to demonstrate a "compelling interest" of the State. (See appellant's Brief pages 10 & 11) These quotations presumably are to replace the evidentiary burden of the State under *Sherbert* which is missing from the record in this case.

It is submitted that such historical quotations are not sufficient to meet the requirement that the compelling interest be against "only the gravest abuses, endangering

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12. It is maintained that Appellant has the burden of proof in meeting this test. *Sherbert,* supra.

paramount interests." *Sherbert v. Verner,* 374 U.S. at 406.

However even Thomas Jefferson gave adequate refutation to the position of the Appellants when he stated:

> "Is it a right or duty in society to take care of their infant members in opposition to the will of the parent? How far does this right and duty extend? — to guard the life of the infant, his property, his instructions, his morals? The Roman father was supreme in all these: we draw a line, but where? — public sentiment does not seem to have traced it precisely. Nor is it necessary in the present case. It is better to tolerate the rare instance of a parent refusing to let his child be educated than to shock the common feelings and ideas by the forcible asportation and education of the infant against the will of the father."[13]

2. *The Government has alternative means available to attain its legislative goal*

Assuming the Appellant could prove some paramount government interest, they must still prove that the Government has no alternative means to attain its legislative goal.

In announcing the test to be applied in *Sherbert,* the Court adopted the proposition enunciated in *Shelton v. Tucker* (1960) 364 U.S. 479, 5 L.Ed. 2d 231, 81 S.Ct. 247:

> ". . . it would plainly be incumbent upon the (government) to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights." (citing *Shelton*) (footnote omitted) 384 U.S. 407.

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13. Thomas Jefferson and Education in a Republic, Edited by Arrowood, page 61 (Citing "Early History of the University of Virginia as Contained in the Letters of Thomas Jefferson and Joseph C. Cabell," p. 97).

In striking down a state requirement that teachers file affidavits listing the associations of which they were members, the Court observed:

> "In a series of decisions, this Court has held that even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties *when the end* can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same purpose." *Shelton v. Tucker* (1960) 364 U.S. 479, 5 L.Ed. 2d 231, 81 S.Ct. 247 (emphasis added).[14]

In *Sherbert*, the State argued that if it were made to grant an exemption to those who refused to work on Saturdays because of religious scruples then:

> ". . . the filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work might not only dilute the unemployment compensation fund, but also hinder the scheduling of employers of necessary Saturday work." 374 U.S. at 407.

But since the state failed to show that the fund available for unemployment compensation could not be safeguarded if Sabbatarians were permitted to refuse Saturday work, the Plaintiff prevailed:

> "... The Appellees suggest no more than a *possibility* (that the government's interest would be impaired)." (emphasis added) *Sherbert*, 374 U.S. at 407.

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14. For examples of recent cases in which the government was required to demonstrate that it had no alternative means available for attaining the legislative goal and still protect First Amendment rights; see: *Kovach v. Maddux*, 238 F. Supp. 835, 844 (MD Tenn. 1965); *Heilberg v. Fixa*, 236 F. Supp. 405, 408 (N.D. Cal., S.D., 1964); *Barnett v. Rodgers*, 410 F. 2d 995, 1000 (D.C. Cir. 1969).

In the instant case, the Appellant must prove that the granting of a religious exemption would substantially impair a paramount interest of the Government in promoting public safety, peace or order.

> "The conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order." *Sherbert,* 374 U.S. at 403.
>
> ". . . in this highly sensitive constitutional area, "*only the gravest abuses,* endangering paramount interests, *give occasion for permissible limitation . . .*'" (citing *Thomas v. Collins*) (emphasis added) *Sherbert,* 374 U.S. 406.

CONCLUSION

The State seems to acknowledge that Amish people are "fine, pious, industrious and thrifty" and can find nothing in the practice of their religion harmful to their fellowman. Also the State must recognize that compulsory education violates basic cardinal precepts of the Amish religion and that it would tend to destroy its continued existence by the State through its education system driving a wedge between parent and child.

The State overlooks the grave psychological disturbances that will inevitably spring from being taught by day teachings that are religiously opposed by the parent and living by night under parental authority that condemns the child's daytime activities as sin. The resulting guilt complexes that would be experienced by the child are inevitable. Nevertheless the State ignores the realities of life and rests its case on its desire to guarantee the Amish child the dubious advantage of our sick society.

Whether one accepts the above statement, an examination of the record discloses that the State has utterly and completely failed to show that it has an overwhelming governmental interest of such a character and nature as to dictate and compel the Amish to either capitulate to

the State and compromise their religious conviction or find a new home where conscience is less restricted and religious freedom is given greater respect.

Respectfully submitted,

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